Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

GENERAL MOTORS CORPORATION,

Petitioner,

v.

ROGER W. TRACY, TAX COMMISSIONER OF OHIO,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Ohio

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does Ohio's use tax, which exempts gas purchased from local public utilities while taxing gas purchased out-of-State, discriminate against interstate commerce in violation of the Commerce Clause?

2. Does a purchaser of natural gas — which pays the use tax — have standing under the Commerce Clause to challenge such a use tax either in its own right or as a representative of vendors?

3. Does Ohio's discriminatory use tax violate the Equal Protection Clause?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the Ohio Supreme Court were General Motors Corporation and Roger W. Tracy, Tax Commissioner of Ohio.

Pursuant to Supreme Court Rule 29.6, Petitioner General Motors Corporation states that it has no parent companies. General Motors has several nonwholly owned subsidiaries, which are set forth in the Appendix at pages 29a-35a.

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PETITION FOR A WRIT OF CERTIORARI

General Motors Corporation ("GM") respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Ohio in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio is reported at 652 N.E.2d 188. It is reprinted at pages 1a-5a of the appendix to this petition. The Orders of the Supreme Court of Ohio denying General Motors' petition for reconsideration are reported at 655 N.E.2d 188. They are reprinted at pages 26a-28a of the appendix to this petition. The relevant orders of the Ohio Board of Tax Appeals and Tax Commissioner of Ohio are also unreported. These orders are reprinted at pages 6a-19a and 20a-25a of the appendix to this petition.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on August 9, 1995. A timely petition for reconsideration in that court was denied on October 4, 1995. On December 19, 1995, Justice Stevens extended the time for filing a petition for certiorari to and including February 1, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Commerce Clause of Article I, section 8 to the United States Constitution provides:

> The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

This case involves Commerce Clause and Equal Protection Clause challenges to Ohio's sales and use tax scheme, which exempts from tax natural gas purchased from Ohio-based public utilities but taxes purchases from out-of-State suppliers.

The Natural Gas Market. A purchaser of natural gas has essentially two choices of suppliers: producers or marketers of natural gas, or local distribution companies. Producers of natural gas, most of whom are concentrated in the southwestern United States, extract the gas from underground reservoirs;[1] marketers, as the name implies, market producers' gas. Local distribution companies are typically local public utilities, such as The East Ohio Gas Company or Columbia Gas of Ohio, Inc. I Tr. 97; II Tr. 67; II Tr. 75-76.[2]

Until the last dozen years, interstate pipeline companies and local public utilities were barred from serving as common carriers of natural gas for producers and marketers. II Tr. 158. As a consequence, producers almost never sold gas directly to consumers (the "burner-tip" market). II Tr. 17. Rather, producers' gas was most often sold in the first instance to interstate pipeline companies, who transported gas to public utilities which eventually sold the gas to the end user. *See* Breyer & MacAvoy, *The Natural Gas Shortage and the Regulation of Natural Gas Producers,* 86 Harv. L. Rev. 941, 944 (1973).

However, this prohibition on common carriage was lifted in the mid-1980s, first in Ohio as a partial solution to natural gas shortages, and later on the national level as part of the massive deregulation of the natural gas industry which occurred in the 1980s. II Tr. 17; II Tr. 140-41; *see generally* Pierce, *Natural*

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[1] *See* W. Fox, *Federal Regulation of Energy* § 15.02, at 424-25 (1983).

[2] References to "I Tr. ___" and "II Tr. ___" are to volumes I and II, respectively, of the transcript of record before the Ohio Board of Tax Appeals. References to "Supp. ___" are to the Supplement of record materials before the Ohio Supreme Court.

Gas Regulation, Deregulation, and Contracts, 68 Va. L. Rev. 63 (1982). These changes allowed producers and marketers of natural gas to compete directly with local public utilities for sales of natural gas to burner-tip consumers. II Tr. 158.

Since entering the burner-tip market, producers and marketers of natural gas have been enormously successful. This is principally because, even with transportation costs, producers and marketers are able to sell at lower costs than local public utilities. II Tr. 75; II Tr. 141. One marketer estimated that this manner of selling natural gas has grown from virtually zero in the early 1980s to "probably 80 or 90 percent of the gas that's consumed by industrial users" like GM. II Tr. 141.

General Motors' Activities. General Motors Corporation purchases natural gas used for power and heating purposes in its plants in Ohio. Since 1984, GM has bought natural gas directly from producers and marketers of natural gas outside of Ohio. II Tr. 59. During the tax period in issue (January 1, 1987 through June 30, 1990), GM's Ohio plants purchased most of their natural gas requirements directly from out-of-State producers or marketers rather than buying gas from the Ohio-based public utilities which served its Ohio plants. II Tr. 74. GM purchased from these out-of-State sources because they offered significantly lower prices than the in-State utilities. II Tr. 75; Supp. 202.

Under GM's contracts with the out-of-State sellers, GM acquired title to the gas at the point that the seller delivered the gas to the initial receiving pipeline; all of these delivery points were outside of Ohio. App. 1a. GM then contracted with interstate pipeline companies and local public utilities in Ohio for the transportation of the gas through pipelines to GM's plants as needed. *Id.*

The Ohio Statutory Scheme. The State of Ohio imposes a sales tax on goods purchased in Ohio, including natural gas. *See* Ohio Rev. Code Ann. § 5739.02. Similarly, that State imposes a use tax on goods, including natural gas, purchased outside of Ohio but used in Ohio. *See* Ohio Rev. Code Ann. § 5741.02(A). However, natural gas purchased from a "natural gas company" is

exempted. *See* Ohio Rev. Code Ann. § 5739.02(B)(7).[3] Under the Ohio code, "[a]ny person . . . [i]s a natural gas company when engaged in the business of supplying natural gas for lighting, power, or heating purposes to consumers within this state." Ohio Rev. Code Ann. § 5727.01(D)(4).

As discussed below, the Ohio Supreme Court in this case and in its recent decision in *Chrysler Corp. v. Tracy*, 652 N.E.2d 185 (Ohio 1995), has construed the Ohio Rev. Code Ann. § 5727.01(D)(4) definition of "natural gas company" to be limited to companies that "own or operate the transportation and distribution equipment and deliver the natural gas to consumers in Ohio." App. 3a. *See also Chrysler Corp. v. Tracy*, 652 N.E.2d at 187. In other words, only purchases from Ohio public utilities are exempt.

The Tax Commissioner's Assessment. For the audit period at issue here, the Ohio Tax Commissioner assessed Ohio use tax upon GM's purchases of natural gas, with a minor exception not relevant to this case. App. 24a.[4]

Proceedings Before The Board of Tax Appeals. GM appealed the Commissioner's final determinations to Ohio's Board of Tax Appeals ("BTA"). On February 25, 1994, the BTA affirmed the Commissioner's denial of the claimed exemption. App. 6a-19a

The BTA first held that GM's purchases were subject to tax under the statute. It held that the out-of-State "marketers and/or

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[3] Under Ohio law, sales and use tax does not apply to

> [s]ales of natural gas by a natural gas company . . . if [it] is delivered to consumers through . . . pipes, or conduits, . . . all terms as defined in section 5727.01 of the Revised Code.

Ohio Rev. Code Ann. § 5739.02(B)(7).

[4] That exception was for natural gas used at GM's plants for direct use in manufacturing, which is exempt from tax under Ohio Rev. Code Ann. § 5739.01(E)(2).

producers of gas" who sold the gas in question were not "natural gas companies" under Ohio Rev. Code Ann. § 5727.01. App. 10a, 13a. The BTA found "dispositive" its recent prior decision in *Chrysler Corp. v. Tracy*, B.T.A. Case No. 91-K-1523 (Jan. 21, 1994), in which the BTA

> concluded that a broker or marketer of natural gas, which did not produce natural gas, did not have the physical capabilities to transport natural gas to its customers, and which was not subject to regulation as a public utility, did not qualify as a "natural gas company" as that term is defined in R.C. 5727.01.

App. 13a (footnote omitted). Thus, under the BTA's construction of the statute, GM was not entitled to the use tax exemption because it was not purchasing its gas from a local public utility.

The BTA also rejected GM's "constitutional challenges with respect to the Tax Commissioner's application of a statute to a given set of facts," despite recognizing that under Ohio law the BTA "is without jurisdiction to determine the constitutional validity of a given statute." App. 15a. It concluded that GM had not shown that application of the statute to GM's practices was unconstitutional. App. 15a-16a.[5]

Proceedings Before The Ohio Supreme Court. GM appealed the BTA's decision to the Supreme Court of Ohio. In addition to again urging its statutory argument, GM argued that under the interpretation of "natural gas company" advanced by the Commissioner and adopted by the BTA, the use tax exemption was unconstitutional under the Commerce and Equal Protection Clauses. GM noted that the BTA's construction, which limited the definition of "natural gas companies" to companies having "the physical capabilities to transport natural gas to its cus-

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[5] Under Ohio law, "the BTA receives facts but cannot rule on the [constitutional] question[s]." *MCI Telecommunications Corp. v. Limbach*, 625 N.E.2d 597, 599 (Ohio), *cert. denied*, 115 S. Ct. 77 (1994).

tomers," effectively limited the exemption to purchases from local public utilities while taxing all out-of-state purchases. As a result of this unconstitutional discrimination, GM argued, it was deprived of the use tax exemption and paid higher taxes as a result.

The Ohio Supreme Court's Decision. On August 9, 1995, the Ohio Supreme Court handed down its decision. Following its affirmance of the BTA's decision in *Chrysler Corp. v. Tracy*, 652 N.E.2d 185, decided that same day, the court rejected GM's statutory argument on the ground that its vendors were not "natural gas companies" because they did not deliver gas to customers in Ohio. App. 2a, 3a.

The court also rejected GM's Commerce Clause argument on two grounds. First, the court saw no impermissible discrimination in exempting only Ohio public utilities, since independent marketers of gas within Ohio, like out-of-State sellers, were also subject to tax:

> We have before us purchases by GM of natural gas from a company that does not own any production, transportation, or distribution equipment. The commissioner claims that he would tax purchases from these persons whether they sold natural gas in-state or out-of-state. Thus, the commissioner's application of the statute does not benefit in-state purchasers by favoring in-state vendors over out-of-state vendors; he treats purchases from both the same.

App. 4a.

Second, the court held that "on close inspection," GM was arguing that the application of the exemption statute "burdens out-of-state vendors of natural gas." *Id.* However, the court held that GM "lacks standing" to make this claim because it was not "a member of that class" of out-of-State vendors. *Id.*

The supreme court also rejected GM's Equal Protection challenge, which it viewed as "submerged in [GM's] Commerce Clause argument." *Id.*

GM moved for reconsideration in the Ohio Supreme Court. Reconsideration was denied on October 4, 1995. App. 26a-28a.

REASONS FOR GRANTING THE WRIT

This case presents important questions concerning the constitutionality of state discrimination against out-of-State sellers of natural gas.

I. THE DECISION OF THE OHIO SUPREME COURT CONFLICTS WITH THIS COURT'S COMMERCE CLAUSE PRECEDENTS

An Ohio manufacturer wishing to purchase natural gas for use in his plant has two options: He can buy his natural gas requirements from a local public utility, or he can buy from a producer or marketer of natural gas. Ohio will allow him a tax exemption for his purchases — but only if he purchases the gas from a local public utility. If the purchase is not made locally, no exemption is available. Such parochial favoritism, endorsed by the Ohio Supreme Court, is completely inconsistent with the Commerce Clause.

The Ohio Supreme Court sought to justify this discrimination on two grounds, neither of which is sustainable.

A. The Ohio Supreme Court's Holding That The Tax Is Constitutional Because It Also Burdens Some In-State Purchases Conflicts With This Court's Decisions

In *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963), this Court held that when a State provides an exemption from sales tax, it must provide a strictly equal exemption from use tax for the same goods when purchased outside the State. *Id.* at 73. In taxing sales by out-of-State sellers marketing their products within the State, a State thus must follow a "strict rule of equality." *Id.* This "strict rule" means that States may not impose a *use* tax on out-of-State purchases which is greater than its *sales* tax on in-State sales. *Associated Indus. of Mo. v. Lohman*, 114 S. Ct. 1815, 1821 (1994). And even a small amount of discrimination against interstate commerce is

unconstitutional: This Court's cases "indicate that where discrimination is patent, as it is here, neither a widespread advantage to in-state interests nor a widespread disadvantage to out-of-state competitors need be shown." *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 276 (1988). In sustaining Ohio's lopsided exemption from sales and use tax, the Ohio Supreme Court heeded neither principle.

The principal justification which the Ohio Supreme Court offered for its decision was this: The Commissioner "treats in-state and out-of-state purchases from independent marketers of natural gas the same." App. 3a. In other words, because the exemption was denied for *some* in-State purchases as well as *all* out-of-State purchases, it was held to be constitutional. This Court's decisions, however, are uniformly to the contrary: A State may not save a tax from unconstitutionality simply because it favors only *some*, but not all, in-State commerce.

This principle has been established at least since *Brimmer v. Rebman*, 138 U.S. 78 (1891). That case addressed a Virginia statute that imposed special inspection fees on meat slaughtered more than 100 miles from the place of sale. This favoring of local commerce violated the Commerce Clause. Importantly, the Court explained, it was immaterial that the statute also disfavored some local commerce:

> The fees exacted, under the Virginia statute, for the inspection of beef, veal and mutton, the product of animals slaughtered one hundred miles or more from the place of sale, are, in reality, a tax; . . . . *Nor can this statute be brought into harmony with the Constitution by the circumstance that it purports to apply alike to the citizens of all the States, including Virginia*; for, "a burden imposed by a State upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the States, including the people of the State enacting such statute." *Minnesota v. Barber*, [136 U.S. 313, 326 (1890)]; *Robbins v. Shelby Taxing District*, 120 U.S. 489, 497 [(1887)].

Id. at 82-83 (emphasis added).

In the intervening century, the rule of *Brimmer* has consistently been recognized by this Court. *Dean Milk Co. v. City of Madison,* 340 U.S. 349 (1951), invalidated a Madison, Wisconsin ordinance which forbade the sale of milk in the city as "pasteurized" unless it had been pasteurized and bottled at an approved pasteurization plant "within a radius of five miles from the central portion of the City of Madison otherwise known as the Capitol Square." *Id.* at 350 & n.1. Like the statute at issue here, the Madison ordinance burdened *all* out-of-State product, and *some* in-State product. But that did not keep the ordinance from violating the Commerce Clause:

> It is immaterial that Wisconsin milk from outside the Madison area is subjected to the same proscription as that moving in interstate commerce.

Id. at 354 n.4.

Four Terms ago, this Court reaffirmed the rule of *Brimmer* in *Fort Gratiot Sanitary Landfill v. Michigan Department of Natural Resources,* 112 S. Ct. 2019 (1992). *Fort Gratiot* struck down a Michigan law prohibiting landfill operators from accepting solid waste originating outside the county of the landfill. Relying on the passage from *Brimmer* quoted above, and on *Dean Milk,* the Court held that Michigan's law, which favored only the small amount of in-State waste originating in the particular county, while disfavoring *all* out-of-State waste and *most* in-State waste, still violated the Commerce Clause. *Id.* at 2024-26.

And only two Terms ago, this Court applied the same rule to strike down a Clarkstown, New York, ordinance requiring all solid waste to be processed at that town's local transfer station before leaving the municipality. *C & A Carbone, Inc. v. Town of Clarkstown,* 114 S. Ct. 1677, 1682 (1994). Relying expressly on *Dean Milk* and *Fort Gratiot,* this Court held that "the flow control ordinance discriminates, for it allows only the favored operator to process waste that is within the limits of the town. The ordinance is no less discriminatory because in-state or in-town processors are also covered by the prohibition." *Id.*

This rule has repeatedly been applied in State tax cases which, like *Brimmer*, recognize the basic principle that a law which discriminates against out-of-State commerce, while favoring *some* in-State commerce, is invalid under the Commerce Clause even if it also disfavors some intrastate transactions. For example, in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), this Court considered a Hawaii sales tax which taxed all sales of liquor at wholesale, but exempted from the tax okolehao (a brandy produced from a root native only to Hawaii) and pineapple wine. Other locally produced liquors, such as "sake and fruit liqueurs [were] not exempted from the tax." *Id.* at 265. This Court held the discriminatory exemption violative of the Commerce Clause, despite the fact that the exemption was also denied to some in-State liquors. "[T]he effect of the exemption is clearly discriminatory, in that it applies only to locally produced beverages, even though it does not apply to all such products." *Id.* at 271. So too, the Ohio exemption "applies only to locally-[sold gas], even though it does not apply to all such products."

The decision below also conflicts with *Associated Industries of Missouri v. Lohman*, 114 S. Ct. 1815. There, the Court struck down Missouri's use-tax scheme, which allowed local governments to impose their own sales and use taxes on top of the State-imposed sales and use taxes. In some Missouri counties, but not in all, the combined State and local use tax on out-of-State sales exceeded the State and local sales tax on in-State sales. This was unconstitutional because it violated the "strict rule of equality" articulated in *Halliburton*, 373 U.S. at 73. It was immaterial to the Court's analysis that the discrimination was isolated in certain counties and not statewide, and that in many counties there was no discrimination against out-of-State purchases.

The same principle has been applied in the flat-tax cases. In *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266 (1987), this Court rejected Pennsylvania's argument that its flat axle tax on trucks, which placed a disparate burden upon out-of-State drivers (who in general would use Pennsylvania's roads only sporadically), could be saved from unconstitutionality because

some out-of-State trucks traveled more in Pennsylvania than some local trucks — *i.e., some* in-State commerce was burdened more than *some* out-of-State commerce. This Court acknowledged that this occurred on occasions, but nonetheless held the tax unconstitutional. *Id.* at 286-87.

The tax exemption scheme upheld by the Ohio Supreme Court causes similar distorting effects on the national market. Indeed, the Ohio scheme appears to be little more than a tariff on all gas not sold by a local public utility. But tariffs are *per se* forbidden by the Commerce Clause, because they "violate[ ] the principle of the unitary national market by handicapping out-of-state competitors, thus artificially encouraging in-state production even when the same goods could be produced at lower cost in other States." *West Lynn Creamery, Inc. v. Healy*, 114 S. Ct. 2205, 2211 (1994).

The favorable tax exemption, granted only to purchases from local public utilities, discriminates in favor of local commerce, and against the lower-priced gas available in interstate commerce. The decision of the court below, upholding this exemption scheme, results in a clear conflict with this Court's decisions.

B. The Ohio Supreme Court's Ruling On Standing Conflicts With Decisions Of This Court

The Ohio Supreme Court's second justification for its decision is equally untenable. That court appeared to hold that GM, the taxpayer, had no standing to challenge the tax under the Commerce Clause because "GM is not a member of that class" of "out-of-state vendors of natural gas." App. 4a. The supreme court reached this conclusion despite the fact that the Ohio use tax is imposed on consumers, such as GM. Ohio Rev. Code Ann. § 5741.02. This holding also conflicts with decisions of this Court.

This Court's decisions make clear that the Commerce Clause protects more than sellers; it also protects purchasers who wish to buy goods in an evenhanded national market. As Justice Jackson explained in the seminal case of *H.P. Hood & Sons, Inc.*

v. Du Mond, 336 U.S. 525 (1949), the Commerce Clause not only protects "every farmer" and "every craftsman"; it also protects "every consumer":

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, *every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any*. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

Id. at 539 (emphasis added). *See also West Lynn Creamery*, 114 S. Ct. at 2218. The Commerce Clause protects the rights of all participants to "engage in commerce"; that clause confers "a freedom to trade with any State, to engage in commerce across all state boundaries." *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 335 (1977). Under the principles of these cases, a purchaser of out-of-State goods plainly has standing to challenge a discriminatory tax on Commerce Clause grounds.

The decision below also conflicts with this Court's specific holding in *Bacchus*. There, the State also urged that the petitioners lacked standing under the Commerce Clause. Petitioners were wholesalers of liquor who were obliged by State law to add the 20% excise tax to their sales price, to collect the tax, and to remit it to the authorities. *Bacchus*, 468 U.S. at 266. The Court held that the wholesalers had standing in part because "they must return the tax to the State." *Id.* at 267. GM, too, "must return the tax to the State"; that is enough for it to have standing to raise a Commerce Clause violation.

As this Court noted in *Bacchus*, "discrimination between in-state and out-of-state *goods* is as offensive to the Commerce Clause as discrimination between in-state and out-of-state *taxpayers*." *Id.* at 268 n.8 (emphasis added). When "goods" are

discriminated against, a buyer or potential buyer of those goods is just as damaged as a seller or potential seller.

The conflict between the decision below and the decisions of this Court is confirmed by two recent decisions of this Court which allowed in-State taxpayer-purchasers to bring Commerce Clause claims even though the "class" being discriminated against was the class of out-of-State sellers. In *Associated Industries*, where Missouri's use tax was at issue, one of the petitioners, Alumax Foils, Inc., was "a manufacturing firm in Missouri that pays the additional use tax on goods purchased from outside the State." 114 S.Ct. at 1819. Alumax and Associated Industries' Commerce Clause claim was successful; no "standing" problem with Alumax's claim was even adverted to by this Court. And in *West Lynn Creamery*, decided later that same Term, in-State milk *dealers* successfully brought a Commerce Clause challenge to a Massachusetts milk pricing order, even though the "class" being discriminated against was out-of-State milk *farmers*, from whom the in-State dealers purchased their raw milk supply. 114 S.Ct. at 2209. Again, no "standing" concerns were present.

Plainly GM in this case was raising its own Commerce Clause-protected "'right' to engage in interstate trade free from restrictive state regulation." *Dennis v. Higgins*, 498 U.S. 439, 448 (1991). The contrary decision of the court below conflicts with this Court's precedents and merits review.

Moreover, GM would have had standing even if it had been raising the rights of the "class" of out-of-State sellers. Under this Court's "prudential" standing doctrine of *jus tertii*, GM also plainly has standing to raise the constitutional rights of its sellers. (1) GM suffered an "injury in fact" by being forced to pay the taxes; (2) buyers and sellers have a sufficiently close relationship to allow one to raise the rights of the other, *Craig v. Boren*, 429 U.S. 190, 195-96 (1976) (vendor allowed to raise equal protection rights of customers); and (3) the out-of-State sellers, who likely make only a minimal percentage of their sales in Ohio, and are not liable for the taxes in any event, would have little, if any,

incentive to challenge the statute in their own name. *See generally Singleton v. Wulff*, 428 U.S. 106 (1976).

Certiorari should be granted to resolve this conflict.

C. The Issues Are Recurring And Important

The issues presented in this case have serious implications for the taxation of natural gas purchases nationwide. But these issues also have broad significance well beyond the specific industries involved in this case. If States are allowed, for taxing purposes, to draw distinctions based on whether or not a seller owns and utilizes its own delivery services, the door would be open to State taxation schemes which broadly favor in-State commerce and discriminate against interstate commerce.

One can imagine numerous examples of the mischief the Ohio Supreme Court's decision could be used to justify. Ohio could apply the reasoning approved by the court below and exempt purchases of local newspapers (such as the *Cleveland Plain Dealer* or the *Columbus Dispatch*) from sales tax, on the stated ground that those local papers utilize their own delivery services. Purchases of otherwise-similar national newspapers (*e.g., USA Today, The New York Times, The Wall Street Journal*), which contract with others for delivery services, would still be taxed. The result would plainly be favoritism of the local newspaper.

Next, Virginia could use the same logic to exempt sales tax on purchases of furniture from stores which deliver using their own delivery trucks. Virginia stores would be favored over stores in High Point, North Carolina, which sell furniture at deep discount prices but ship to buyers by common carrier. The result: Higher-priced local furniture gains a tax advantage, distorting the price advantage of the North Carolina sellers. *Compare, e.g., West Lynn Creamery*, 114 S. Ct. at 2211.

Finally, New York could exempt from tax all milk sold in the State, but only if delivered by the milk producer's in-State distribution facilities. The effect of that tax, too, would be economic balkanization, for Vermont milk producers simply do

not have their own distribution networks in New York State. *Compare id.*

Certiorari should be granted to consider these issues of wide-ranging and national importance.

II. THE OHIO SUPREME COURT'S DECISION ALSO CONFLICTS WITH THIS COURT'S EQUAL PROTECTION CLAUSE PRECEDENTS

As discussed in Section I above, the Ohio use tax as interpreted by that state's supreme court favors in-State sellers of natural gas. As a result, the use tax exemption also violates the Equal Protection Clause by favoring those who purchase from in-State sellers, at the expense of customers in interstate commerce such as GM. The Ohio Supreme Court's decision, which rejected GM's Equal Protection claim by refusing to acknowledge the discrimination, thus conflicts with *Metropolitan Life Ins. Co. v. Ward,* 470 U.S. 869 (1985). In *Metropolitan Life,* this Court held that discrimination against out-of-state interests often independently violates the Equal Protection Clause. *Id.* at 881. Moreover, since the statutory distinction burdens the fundamental right to engage in interstate commerce, strict scrutiny review under the Equal Protection Clause is appropriate *(see id.* at 878), and there is no adequate justification for the discrimination incorporated into the Ohio tax scheme.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 1, 1996

APPENDIX

SUPREME COURT OF OHIO

GENERAL MOTORS CORPORATION,
Appellant,

v.

TRACY, Tax Commr.,
Appellee

Nos. 94-642, 94-643 and 94-644.

Decided Aug. 9, 1995.

General Motors Corporation ("GM"), appellant, contests the assessment of use tax on its purchases of natural gas from out-of-state vendors.

GM purchased natural gas from independent natural gas marketers to heat its manufacturing plants. These marketers obtained natural gas from producers outside the state and arranged for transportation to the initial receiving pipeline of the national natural gas pipeline outside the state. These marketers did not own the transportation equipment; they paid a fee to pipeline companies to transport the natural gas to the insertion points. GM took title to the gas at delivery to the receiving pipeline outside the state. GM then arranged to transport and deliver the natural gas to its locations in Ohio: the Lordstown plant, the Defiance Central Foundry, and the Packard Electric facility in Warren.

The Tax Commissioner, appellee, assessed a use tax for various audit periods in these three cases because GM purchased the natural gas outside Ohio and consumed it in Ohio. GM appealed the commissioner's order to the Board of Tax Appeals ("BTA"), and the BTA affirmed the order (except for a penalty on preassessment interest), citing for support its decision in

Chrysler Corp. v. Tracy (Jan. 21, 1994), BTA No. 91-K-1523, unreported.

These causes are now before this court upon appeals as of right.

Jones, Day, Reavis & Pogue, John C. Duffy, Jr., Timothy B. Dyk and Gregory A. Castanias, Cleveland, for appellant.

Betty D. Montgomery, Atty. Gen., and Barton A. Hubbard, Asst. Atty. Gen., for appellee.

Emens, Kegler, Brown, Hill & Ritter Co., L.P.A., Paul D. Ritter, Jr., Holly R. Fischer and Thomas W. Hill, Columbus, urging affirmance for amicus curiae, Enron Access Corp.

PER CURIAM.

R.C. 5741.02 imposes a use tax on the storage, use, or consumption of tangible personal property in Ohio. R.C. 5741.02(C)(2) exempts from this tax acquisitions "which, if made in Ohio, would be a sale not subject to the tax imposed by sections 5739.01 to 5739.31 of the Revised Code." GM claims that the instant acquisitions would be exempt under R.C. 5739.02(B)(7) as sales of natural gas by a natural gas company.

However, in *Chrysler Corp. v. Tracy* (1995), 73 Ohio St.3d 26, 652 N.E.2d 185, we upheld the determination of the Public Utilities Commission of Ohio that a vendor in the type of sales now before us is by definition not a natural gas company and held that R.C. 5739.02(B)(7) does not exempt this type of sale. Consequently, we affirm the BTA's decision as to this claim.

GM also contends that the commissioner's application of this exemption statute violates the Commerce and Equal Protection Clauses of the Federal Constitution. According to *New Energy Co. of Indiana v. Limbach* (1988), 486 U.S. 269, 273-274, 108 S.Ct. 1803, 1807-1808, 100 L.Ed.2d 302, 308:

> It has long been accepted that the Commerce Clause not only grants Congress the authority to regulate commerce among the States, but also directly limits the power of the States to

discriminate against interstate commerce. *See, e.g., Hughes v. Oklahoma,* 441 U.S. 322, 326 [99 S.Ct. 1727, 1731, 60 L.Ed.2d 250, 255-256] (1979); *H.P. Hood & Sons, Inc. v. Du Mond,* 336 U.S. 525, 534-535 [69 S.Ct. 657, 663-664, 93 L.Ed. 865, 872-873] (1949); *Welton v. Missouri,* 91 U.S. 275 [23 L.Ed. 347] (1876). This 'negative' aspect of the Commerce Clause prohibits economic protectionism — that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors. *See, e.g., Bacchus Imports, Ltd. v. Dias,* 468 U.S. 263, 270-273 [104 S.Ct. 3049, 3054-3056, 82 L.Ed.2d 200, 208-210] (1984); *H.P. Hood & Sons, supra,* at 532-533 [69 S.Ct. at 662-663, 93 L.Ed. at 871-872]; *Guy v. Baltimore,* 100 U.S. 434, 443 [25 L.Ed. 743] (1880). Thus, state statutes that clearly discriminate against interstate commerce are routinely struck down, *see, e.g., Sporhase v. Nebraska ex rel. Douglas,* 458 U.S. 941 [102 S.Ct. 3456, 73 L.Ed.2d 1254] (1982); *Lewis v. BT Investment Managers, Inc.,* 447 U.S. 27 [100 S.Ct. 2009, 64 L.Ed.2d 702] (1980); *Dean Milk Co. v. Madison,* 340 U.S. 349 [71 S.Ct. 295, 95 L.Ed. 329] (1951), unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism, *see, e.g., Maine v. Taylor,* 477 U.S. 131 [106 S.Ct. 2440, 91 L.Ed.2d 110] (1986).

According to the testimony, the commissioner exempts sales of natural gas only if the selling companies own or operate the transportation and distribution equipment and deliver the natural gas to consumers in Ohio. GM reasons that only Ohio companies owning transportation and distribution equipment can qualify because only these domestic companies can physically deliver natural gas to Ohio consumers. Thus, so it argues, the commissioner's application is an undue burden on interstate commerce and invalid. The commissioner responds that he treats in-state and out-of-state purchases from independent marketers of natural gas the same; he does not exempt either one's sales if it does not own the transportation and distribution equipment.

We have before us purchases by GM of natural gas from a company that does not own any production, transportation, or distribution equipment. The commissioner claims that he would tax purchases from these persons whether they sold natural gas in-state or out-of-state. Thus, the commissioner's application of the statute does not benefit in-state purchasers by favoring in-state vendors over out-of-state vendors; he treats purchases from both the same. His application does not violate GM's Commerce Clause Protection.

On close inspection, GM actually argues that the commissioner's application burdens out-of-state vendors of natural gas. However, GM is not a member of that class and lacks standing to challenge the constitutionality of this application on that basis; our further comment on this question is inappropriate. *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.* (1994), 68 Ohio St.3d 547, 557-558, 629 N.E.2d 414, 422.

Also, GM's equal protection argument is submerged in its Commerce Clause argument. It claims that the Equal Protection Clause prohibits Ohio from imposing a more onerous use tax on out-of-state companies engaging in interstate commerce than on domestic companies. However, as concluded in the Commerce Clause discussion, the commissioner does not favor in-state purchases over out-of-state purchases. If the vendor does not own transportation or distribution equipment, the commissioner does not exempt its sales of natural gas to Ohio consumers.

Finally, GM contends that the BTA incorrectly determined that the commissioner did not abuse his discretion in remitting only a portion of the statutory penalty. According to *Jennings & Churella Constr. Co. v. Lindley* (1984), 10 Ohio St.3d 67, 70, 10 OBR 357, 359-360, 461 N.E.2d 897, 900:

> R.C. 5739.13 mandates the imposition of a penalty in the event of an assessment. Remission of the penalty is discretionary. In *Servomation Corp. v. Kosydar* (1976), 46 Ohio St.2d 67 [75 O.O.2d 147, 346 N.E.2d 290], we held this discretionary

power valid and constitutional as an exercise of the state's police power.

Appellate review of this discretionary power is limited to a determination of whether an abuse has occurred. *Interstate Motor Freight System v. Bowers* (1960), 170 Ohio St. 483 [11 O.O.2d 240, 166 N.E.2d 229]. An abuse of discretion connotes a decision that is unreasonable, arbitrary or unconscionable. *State v. Adams* (1980), 62 Ohio St.2d 151, 157 [16 O.O.3d 169, 173, 404 N.E.2d 144, 149]; *Chester Twp. v. Geauga Cty. Budget Comm.* (1976), 48 Ohio St.2d 372, 373 [2 O.O.3d 484, 358 N.E.2d 610, 611]. (Emphasis *sic*; footnote omitted.)

We have consistently refused to find an abuse of discretion on the commissioner's remitting a portion of the statutory penalty, even in the face of good-faith efforts at compliance. *Kings Entertainment Co. v. Limbach* (1992), 63 Ohio St.3d 369, 371, 588 N.E.2d 777, 779. Consequently, we affirm the BTA's decision on the penalty.

Accordingly, we affirm the BTA's decision, since it is reasonable and lawful.

Decision affirmed.

MOYER, C.J., and DOUGLAS, WRIGHT, RESNICK, FRANCIS E. SWEENEY, Sr., PFEIFER and COOK, JJ., concur.

OHIO BOARD OF TAX APPEALS

General Motors Corporation, Appellant,	)) CASE NO. 91-K-1558)
vs.	) (SALES AND USE TAX))
Roger W. Tracy, Tax Commissioner of Ohio, Appellee.	)) DECISION AND ORDER)

APPEARANCES:

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This cause and matter is before the Board of Tax Appeals as a result of a notice of appeal filed by appellant, General Motors Corporation, on November 29, 1991.[1] Appellant appeals a final order of the Tax Commissioner dated October 29, 1991, in which that official determined that appellant's purchases of natural gas were not exempt from use tax for the audit period of January 1, 1987 through December 31, 1989.[2]

In its notice of appeal, appellant specified the following as error existing in the Tax Commissioner's final order:

"1. The Commissioner erred in failing to find that GM's storage, use or other consumption of natural gas that was subjected to assessment here was exempt from the Ohio use tax by R.C. 5739.02(B)(7), as made applicable to the Ohio use tax by R.C. 5741.02(C)(2), because it was acquired from a 'natural gas company' within the meaning of R.C. 5727.01(E)(4) and delivered to GM in Ohio through 'pipes.'

"2. The Commissioner erred in failing to find that MNG must be considered a 'natural gas company within the meaning of R.C. 5727.01(E)(4) for purposes of determining whether GM's storage, use or other consumption of natural gas that was

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[1] By an interim order issued on September 11, 1992, this Board consolidated the present appeal with B.T.A. Case Nos. 92-K-146 and 92-K-510 solely for purposes of discovery and hearing. Subsequently, the parties stipulated certain issues which result in the same issues remaining in each of these appeals. However, due to the parties' agreements with respect to B.T.A. Case Nos. 92-K-146 and 92-K-510, this Board reaffirms its prior order to issue individual decisions in each appeal.

[2] Although referred to in the Tax Commissioner's final order as an assessment of "sales" tax, it appears that the assessments were actually a "use" tax imposed upon appellant's purchases of natural gas for use by its Buick-Olds-Cadillac Group.

subjected to assessment here was exempt from the Ohio use tax by R.C. 5739.02(B)(7), as made applicable to the Ohio use tax by R.C. 5741.02(C)(2).

"3. The Commissioner erred in finding that no 'relevant evidence' was presented to establish that MNG is a 'natural gas company' within the meaning of R.C. 5739.02(B)(7), as made applicable to the Ohio use tax by R.C. 5741.02(C)(2).

"4. The Commissioner's application here of the Ohio sales and use tax laws, particularly R.C. 5727.01, R.C. 5739.02 and R.C. 5741.02, is proscribed by the Commerce Clause of the United States Constitution because it results in an assessment of Ohio use tax on natural gas purchased outside the State of Ohio and delivered through pipes to consumers in Ohio when natural gas purchased within Ohio and delivered through pipes to consumers in Ohio would not be subjected to an Ohio sales or use tax.

"5. The Commissioner's application here of the Ohio sales and use tax laws, particularly R.C. 5727.01, R.C. 5739.02 and R.C. 5741.02, is proscribed by the Equal Protection Clause of the United States Constitution because it results in an assessment of Ohio use tax on natural gas purchased outside the State of Ohio and delivered through pipes to consumers in Ohio when natural gas purchased within Ohio and delivered through pipes to consumers in Ohio would not be subjected to an Ohio sales or use tax.

"6. Assuming, *arguendo*, that GM's storage, use or other consumption of natural gas in issue here is not exempt from Ohio use tax by R.C. 5739.02(B)(7), as made applicable to the Ohio use tax by R.C. 5741.02(C)(2), and, further that the assessment of Ohio use tax here is not proscribed by the Commerce Clause or the Equal Protection Clause of the United States Constitution, Ohio use tax was assessed erroneously on the storage, use or other consumption of natural gas in Ohio that was acquired for use by GM directly in producing tangible personal property for sale by manufacturing or processing. Accordingly, the storage[,] use or other consumption of such

natural gas was exempt from the Ohio use tax by R.C. 5739.01(E)(2), as made applicable to the Ohio use tax by R.C. 5741.02(C)(2).[3]

"7. Assuming, *arguendo*, that GM's storage, use or other consumption of natural gas in issue here is not exempt from Ohio use tax by either R.C. 5739.01(E)(2) or R.C. 5739.02(B)(7), as made applicable to the Ohio use tax by R.C. 5741.02(C)(2), and, further that the assessment of Ohio use tax here is not proscribed by the Commerce Clause or the Equal Protection Clause of the United States Constitution, R.C. 5739.133(A)(3) does not authorize the Commissioner to assess a penalty on preassessment interest charged pursuant to R.C. 5739.133(B).

"7. [sic] Assuming, *arguendo*, that GM's storage, use or other consumption of natural gas in issue here is not exempt from Ohio use tax by either R.C. 5739.01(E)(2) or R.C. 5739.02(B)(7), as made applicable to the Ohio use tax by R.C. 5741.02(C)(2), and, further that the assessment of Ohio use tax here is not proscribed by the Commerce Clause or the Equal Protection Clause of the United States Constitution, the Commissioner abused his discretion in failing to remit entirely any penalties assessed pursuant to R.C. 5739.133(A)."

This matter is now considered by this Board based upon appellant's notice of appeal, the statutory transcript certified by the Tax Commissioner, the evidence presented by the parties at

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[3] In its post-hearing brief, appellant has dismissed the specification of error which appears in each of its appeals which claims that "Ohio use tax was assessed erroneously on the storage, use or other consumption of natural gas in Ohio that was acquired for use by GM directly in producing tangible personal property for sale by manufacturing or processing." *Id.* at 3, fn. 3.

the hearing held before this Board on May 12 and May 14, 1993, and the post-hearing briefs of counsel.[4]

In 1974, appellant formed an Energy Supply Division whose initial function was to operate a natural gas field in northeast Ohio and to supply appellant's Ohio facilities with natural gas. Subsequently, in 1984, due to the deregulation of the natural gas industry, appellant's Energy Supply Division expanded its activities and began purchasing natural gas from suppliers and marketers and supplied approximately 130 of appellant's facilities located throughout the United States. During the audit period, appellant purchased the majority of its natural gas requirements from "marketers and/or producers of gas" (R.II at 76),[5] and arranged for the natural gas to be transported to its Ohio facilities for use in heating and powering. Appellant's Energy Supply Division was billed directly by both those companies which sold it natural gas for the cost of natural gas and by the pipeline companies and local distribution companies for the cost of transporting the natural gas to the facilities where it would be used. The Energy Supply Division paid these costs and billed each plant for the amount of natural gas provided. Included

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[4] We note that a single transcription of the evidentiary hearing has been prepared with respect to B.T.A. Case Nos. 91-K-1558, 92-K-146 and 92-K-510. That transcript, along with the documentary exhibits received into evidence will be considered by this Board with respect to all three appeals which are announced this date. In addition, given the common issues involved, the parties' post-hearing briefs refer to all three cases jointly. Accordingly, these briefs will be considered by this Board in addressing all three appeals.

[5] Although the Tax Commissioner referred in his final order only to appellant's purchases of natural gas from Mobil Natural Gas, Inc., it appears that appellant also purchased natural gas from Mobil Oil Corporation, Yankee Resources, Inc., Rocky Mountain Energy Exchange and Wellhead Enterprises. With respect to Yankee Resources, Inc., the evidence presented by appellant indicates that effective February 23, 1988, Yankee Resources, Inc.'s assets were sold to Yank Gas Acquisition, Inc.

within each billing were the costs of the natural gas, the costs of its transportation and a service charge imposed by the Energy Supply Division.

Following an audit of appellant's purchases, the Tax Commissioner assessed Ohio use tax on appellants purchases of natural gas. Thereafter, appellant filed a petition for reassessment in which it objected to the assessments and requested remission of the penalties which were imposed. Although a portion of the penalty was conditionally remitted, the Tax Commissioner denied appellant's objection to the assessment on the basis that appellant failed to prove that it purchased natural gas from a "natural gas company" as defined by the Revised Code. It is from this determination that appellant now appeals.

In reviewing appellant's appeal, we note that "[a]bsent a demonstration that the commissioner's findings are clearly unreasonable or unlawful, they are presumptively valid." *Alcan Aluminum Corp.* v. *Limbach* (1989), 42 Ohio St. 3d 121, 123. Consequently, it is incumbent upon a taxpayer challenging a finding of the Tax Commissioner to rebut that presumption and establish a right to the relief sought. *Belgrade Gardens* v. *Kosydar* (1974), 38 Ohio St. 2d 135; *Ohio Fast Freight* v. *Porterfield* (1972), 29 Ohio St. 2d 69.

R.C. 5739.02 levies an excise ("sales") tax on all retail sales made in Ohio while a similar excise ("use") tax is imposed upon the use of an item within Ohio by virtue of R.C. 5741.02. If the acquisition of an item is exempt from sales tax, it follows that it is also exempt from use tax. R.C. 5741.02(C). Since the analysis of Ohio's sales and use tax provisions is virtually identical for purposes of this appeal, we will refer to only the applicable sales tax provisions throughout the remainder of our decision.

Appellant claims that its purchases of natural gas are exempt from taxation based upon R.C. 5739.02(B), which provides in pertinent part:

"The tax does not apply to the following:

"***

"(7) Sales of natural gas by a natural gas company, of electricity by an electric company, of water — by a water-works company, or of steam by a heating company, if in each case the thing sold is delivered to consumers through wires, pipes, or conduits, and all sales of communications services by a telephone or telegraph company, all terms as defined in section 5727.01 of the Revised Code[.]"

As referenced in R.C. 5739.02(B)(7), the term "natural gas company" is defined in R.C. 5727.01, which provides in part:

"As used in this chapter:

"(A) 'Public utility' means each person referred to as a telephone company, telegraph company, electric company, natural gas company, pipe-line company, water-works company, water transportation company, heating company, rural electric company, or railroad company.

"***

"(E) Any person:

"***

"(4) Is a natural gas company when engaged in the business of supplying natural gas for lighting, power, or hearing purposes to consumers within this state[.]"

Accordingly, in order to qualify as a "natural gas company" under this statute, the entity at issue must be in the business of supplying natural gas to Ohio consumers for the purpose of lighting, power, or heating. We also find it appropriate to note the following provisions of R.C. 5727.02:

"As used in this chapter, 'public utility,' 'electric company,' 'natural gas company,' 'pipe-line company,' 'water-works company,' 'water transportation company' or 'heating company' does not include:

"(A) Any person that is engaged in some other business to which the supplying of electricity, heat, natural gas, water, water transportation, steam, or air to others is incidental;

"(B) Any person that supplies electricity, natural gas, water, water transportation, steam, or air to its tenants, whether for a separate charge or otherwise; or

"(C) Any person whose primary business in this state consists of producing, refining, or marketing petroleum or its products."

We find our decision recently announced in *Chrysler Corp.* v. *Tracy* (Jan. 21, 1994), B.T.A. Case No. 91-K-1523, unreported, to be dispositive of the issue now before us. In *Chrysler Corp.*, this Board concluded that a broker or marketer of natural gas, which did not produce natural gas, did not have the physical capabilities to transport natural gas to its customers, and which was not subject to regulation as a public utility, did not qualify as a "natural gas company" as that term is defined in R.C. 5727.01.[6]

In the present case, we find that appellant has failed to demonstrate that the companies from whom it purchased its natural gas requirements are natural gas companies as that term is defined by the General Assembly. Although the natural gas was used by appellant in powering and/or heating its facilities, we do find neither unreasonable nor unlawful the Tax Commissioner's finding that the companies from whom appellant contracted to purchase its natural gas requirements fell outside the definition of a "natural gas company" as set forth in R.C. 5727.01(E)(4).

We note that in its reply brief, appellant attempts to distinguish our decision in *Chrysler Corp.* from the present case. Appellant

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[6] The marketer of natural gas in *Chrysler Corp.* v. *Tracy* (Jan. 21, 1994), B.T.A. Case No. 91-K-1523, unreported, as in the present case, was Yankee Resources, Inc.

argues that *Chrysler Corp.* is not controlling since it involved an assessment of sales tax rather than use tax. We are unpersuaded that this fact alone justifies rejection of our application of that case to the present one given the complimentary nature of the two taxing provisions. Appellant also questions this Board's reliance upon *Central Trust Hardware Company* v. *Lindley* (Jul. 25, 1979), B.T.A. Case No. 78-C-244, unreported, wherein we concluded that a definition appearing in R.C. 5727.01 must be read in *pari materia* with the provisions appearing in R.C. 5727.02. Following a review of appellant's arguments, we do not believe that a different result is warranted in the present case.

Appellant also insists that this Board focus exclusively upon the word "supplying" which appears in R.C. 5727.01(E)(4), arguing that its dictionary definitions of that term support a finding that the companies from whom it purchased natural gas are natural gas companies. However, we believe that the term supplying must be reviewed in the context of R.C. Chapter 5727, which provides for the taxation of public utilities. We are persuaded by the Tax Commissioner's citation to *Volmer* v. *Village of Amherst* (1940), 65 Ohio App. 26, in which the court was called upon to interpret the phrase "the products or service of which is or is to be supplied to the municipality or its inhabitants" contained with Section 4, Article XVIII of the Ohio Constitution, as that phrase is applied to electric companies. The court stated in pertinent part:

> "'*** As applied to an electric public utility it is obvious that the words 'the products or service' refer to the generation of electricity, while the words 'to be supplied' refers to its distribution, and that within the meaning of said section an electric public utility is not complete unless it comprises both a generating plant and a distributing system. *Priest* v. *City of Wapakoneta* [(1937), 24 Ohio Law Abs., 214], at p. 224." *Id.* at 31.

While we recognize the factual distinctions which exists between *Volmer* and the present case, we believe the courts interpretation of the phrase "to be supplied" is consistent with

what we believe to have been the intent of the General Assembly in defining the term "natural gas company" as it appears in R.C. 5727.01(E)(4). As those transactions upon which appellant was assessed use tax involve the acquisition of natural gas from entities other than natural gas companies, we conclude that appellant's use of natural gas at its Ohio facilities is not exempt from tax. *Chrysler Corp.*, *supra*. Accordingly, appellant's specifications of error one, two and three are not well-taken and are therefore overruled.

In its specifications of error four and five, appellant claims that the Tax Commissioner's application of R.C. 5727.01, R.C. 5739.02 and R.C. 5741.02 violates both the Commerce Clause and the Equal Protection Clause of the United States Constitution. Clearly, this Board is without jurisdiction to determine the constitutional validity of a given statute. *S.S. Kresge Co.* v. *Bowers* (1960), 170 Ohio St. 405, paragraph one of the syllabus; *Herrick* v. *Kosydar* (1975), 44 Ohio St. 2d 128, 130; *Roosevelt Properties Co.* v. *Kinney* (1984), 12 Ohio St. 3d 7, 8; *Cleveland Gear Co.* v. *Limbach* (1988), 35 Ohio St. 3d 229, paragraph one of the syllabus. However, we may apparently rule upon an appellant's constitutional challenges with respect to the Tax Commissioner's application of a statute to a given set of facts. See *Bd. of Edn. of South-Western City Schools* v. *Kinney* (1986), 24 Ohio St. 3d 184, 185-186; *Cleveland Gear Co.*, *supra*.

In the present case, we do not find that appellant has demonstrated that the Tax Commissioner's imposition of use tax upon appellant's purchases is contrary to the cited provisions of the United States Constitution. Appellant argues at footnote two of its part-hearing brief that the Tax Commissioner assessed tax on appellants purchases of natural gas outside of Ohio while similar purchases of natural gas if made within Ohio would be exempt. However, it appears that the Tax Commissioner's assessment of use tax in the present case is not based upon where title to the natural gas passes. Instead, the Tax Commissioner appears to have assessed use tax upon purchases of natural gas from entities which are without the physical capabilities to transport and distribute natural gas to its customers. As we find

that appellant has not demonstrated the Tax Commissioner's application violates the Constitution, appellant's specifications of error four and five are not well-taken and are overruled.

As previously noted, appellant has dismissed its sixth specification of error. Therefore, we will address appellant's final two specifications of error collectively. Appellant first argues that the Tax Commissioner improperly imposed an additional penalty upon that portion of the penalty reflecting preassessment interest. We agree. In *Tramp Enterprises* v. *Tracy* (Sep. 17, 1993), B.T.A. Case No. 92-R-4, unreported, we held:

> "Applying the law to the facts of this case, the Board finds that the Tax Commissioner acted properly in imposing a penalty on the use tax assessed against the appellants. The Board further finds that the amount of the penalty, fifteen percent, was proper. However, the Board questions the propriety of the Tax Commissioner's action in imposing a fifteen per cent penalty on the preassessment interest amount.
>
> "As previously expressed, R.C. 5739.133(A) requires the Tax Commissioner to impose a penalty on every amount assessed under sections 5739.13 and 5739.15 of the Revised Code. In other words, penalties are to be applied to the amount of *tax* assessed. The Board finds that preassessment interest is not assessed *under* either R.C. 5739.13 or R.C. 5739.15. Rather, the authority to impose and assess preassessment interest is found in R.C. 5739.133(B).
>
> "Thus, construing the subject statutes in favor of the taxpayer as required under *Gulf Oil Corp.* v. *Kosydar* (1975), 44 Ohio St. 2d 208, 218, the Board finds that there is no statutory basis for the imposition of a fifteen per cent penalty on the preassessment interest assessed pursuant to R.C. 5739.133. ***
>
> "Based on the foregoing, the Board finds that with the exception of the fifteen per cent penalty applied to preassessment interest, the penalty imposed against the appellants based upon the use tax is appropriate. Moreover,

> based upon the record and applicable law, the Board does not find the penalty to be grossly inequitable, arbitrary, or capricious." *Id.* at 6-7. (Emphasis supplied and footnote omitted.)

See, also, *Ernst Enterprises, Inc.* v. *Tracy* (Dec. 23, 1992), B.T.A. Case No. 91-A-194, unreported.

Appellant also argues that although the Tax Commissioner conditionally reduced the penalty which was originally imposed to five percent of the assessment, the Tax Commissioner abused his discretion in refusing to remit the penalty in its entirety. In making this argument, appellant refers this Board to the Ohio Supreme Court's decision in *Frankelite Co.* v. *Lindley* (1986), 28 Ohio St. 3d 29, in which the court affirmed this Board's reversal of the Tax Commissioner's refusal to remit a penalty. The court quoted that portion of this Board's decision which related to the imposition of the penalty:

> "The Board of Tax Appeals finds that in this particular case, the appellant [Frankelite] has sufficiently shown that the failure to remit the penalty was an abuse of discretion. Frankelite had an established history of timely filing and payment of sales tax returns. Frankelite maintained an extensive file of exemption certificates and manifested a good faith reliance on them. Frankelite fully cooperated with the tax agents during the audit and undertook a massive campaign to comply with the agents' directions and orders. In short, the record before this Board is replete with demonstrations of appellant's honest and sincere attempts to comply with the tax laws of this state. We believe that the power to remit the statutory penalty was authorized to cover situations such as this." *Id.* at 31.

The court concluded that these reasons provided a sufficient factual basis for the Board's decision.

In the present case, appellant argues that its actions, like the taxpayer in *Frankelite*, justify a similar result. Specifically, appellant states in its post-hearing brief:

"The remarks of the Commissioner's agents clearly show that (i) GM demonstrated awareness of the Ohio sales and use tax law, (ii) exercised reasonable efforts to make timely payments of sales and use taxes, (iii) demonstrated a cooperative attitude toward the agents and the department, and (iv) where appropriate, self-imposed use tax on purchases in which there was no question with regard to the liability." *Id.* at 16.

In reviewing appellant's claim, it must be emphasized that it is incumbent upon a taxpayer to demonstrate that the Tax Commissioner abused that discretion with which he is vested in denying a request for the remission of a penalty. In *Huffman* v. *Hair Surgeon, Inc.*, (1985), 19 Ohio St. 3d 83, the Supreme Court explained what constitutes an abuse of discretion:

"'"[A]n abuse of discretion involves far more than a difference in * * * opinion * * *. The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have an 'abuse' in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias. * * *"' *State* v. *Jenkins* (1984), 15 Ohio St. 3d 164, 222." *Id.* at 87.

In the present case, we are unable to conclude that appellant has shown that the Tax Commissioner abused his discretion. While appellant's actions are to be commended, we do not believe that such actions demonstrate an abuse of discretion on the part of the Tax Commissioner. As the court indicated in *Huffman*, having discretion means choosing between competing interests. In this instance, the Tax Commissioner conditionally remitted a portion of the penalty, presumably taking into consideration appellant's actions. We believe that if we were to reverse the Tax Commissioner's decision in this regard, we would merely be substituting our judgment for his. Accordingly, appellant's seventh specification of error is well-taken and is sustained, while

what we will refer to as its eighth specification of error is not well-taken and is overruled.

Based upon the foregoing, it is the decision of this Board that appellant's seventh specification of error is hereby sustained while the remaining specifications of error are overruled. It is therefore the order of this Board that the final order of the Tax Commissioner is affirmed in part and reversed in part.

I hereby certify the foregoing to be a true and correct copy of the action of the Board of Tax Appeals of the State of Ohio, this day taken, with respect to the above matter.

/s/ Kiehner Johnson
Kiehner Johnson, Chairman

STATE OF OHIO
DEPARTMENT OF TAXATION

In the matter of Sales and Use Tax
Assessment, Serial No. 91002252 S

JOURNAL ENTRY

General Motors Corporation
Central Foundry Division
East Second Street
Defiance, Ohio 43512

Direct Pay Permit No. 98-001900

The Tax Commissioner came this day to consider the above styled matter at Columbus, Ohio. The petitioner appeared and presented at a hearing held at Toledo, Ohio, on August 16, 1991. Final determination is based upon information contained in the file, the petitioner's correspondence, evidence obtained at the hearing, and other relevant information available to the Commissioner.

Now, being fully advised thereon, the Commissioner finds that:

The petitioner, a division of General Motor Corporation, is engaged in the manufacturing of castings for use by the General Motors Assembly plants. This assessment results from an audit of its purchases over the period from October 1, 1986 through June 30, 1990. A timely petition for reassessment and a request for remission of penalty were filed by the petitioner. The petitioner has raised several objections on its petition for reassessment. Each objection will be addressed in detail below.

The taxpayer objects to the assessment of county permissive use tax under R.C. 5739.021 and 5741.02(B) on its withdrawal from inventory of its own vehicles for use in its Product Evaluation Program. The taxable use under R.C. 5741.02(B) which occurs when items are removed from inventory is not

affected by the exceptions for "incorporation into a product for sale" contained in 5739.01(E)(2) and the complementary use tax provisions of R.C. 5741.02(C)(2). That is, raw materials and/or component parts may be purchased under a claim of exception founded on "incorporation into a product for sale", under R.C. 5739.01(E)(2) and 5741.02(C)(2) but, after assembly, be subject to use tax under R.C. 5741.02(B) when withdrawn from inventory. Were this not the case, R.C. 5741.02(B) would have no meaning.

The Taxpayer contends that the holdings of *Fliteways v. Lindley* (1981), 65 Ohio St. 2d 21, *Jeep Corporation v. Limbach* (1989), 47 Ohio St. 3d 67, and the intent of the General Assembly in enacting Am. Sub. H.B. 298, effective 7-26-91, make the subject purchases exempt. In *Fliteways*, the taxpayer provided air charter service and pilot training, and sometimes purchased aircraft for the purpose of subsequent resale. In *Fliteways* the occasional use to defray costs of some purchased airplanes for flight training contrasts sharply with the use of the Program vehicles by the taxpayer. In the Program, a vehicle is not available for sale until after the prescribed mileage has been attained, and the Program participant has completed the evaluation of the vehicle. Rather than defraying costs the Program creates additional costs for the Taxpayer. Moreover, unlike in *Fliteways* where the use of the airplanes was incidental, the Taxpayer's Program systematically extends to hundreds of employees and thousands of vehicles throughout North America.

The Taxpayer also seeks to apply *Jeep Corporation v. Limbach, supra*, which held excepted from sales tax under R.C. 5739.01(E)(2), and the complementary use tax under R.C. 5741.02(C)(2), the purchase of raw materials used to make vehicles which were crash-tested and otherwise subjected to testing by engineers. *Jeep* clearly stands for the proposition that sales or use tax is not due on the purchase of raw materials by a manufacturer even though some percentage of those materials will be incorporated into items ultimately not sold. But the instant matter does not involve sales tax on purchases under R.C. 5739.01(E)(2) or the complementary use tax provisions of

5741.02(C)(2); it involves the *withdrawal from inventory* of finished product under R.C. 5741.02(B) and Ohio Adm. Code 5703-9-04.

In *Jeep* the Court was not presented with the question of whether there was a taxable use of the vehicles under R.C. 5741.02(B) when they were removed from inventory. It was confined to questions concerning incorporation of items into product for sale under R.C. 5739.01(E)(2) and the complementary use tax provisions of R.C. 5741.02(C)(2) for the period 1978 - 1982. The Court implied in broad dicta that "testing" is a nontaxable activity. The testing in *Jeep* was of several types, but all testing was performed by engineers. It was not the unscientific evaluation that takes place in the Taxpayer's Program. The Court held that "the primary use test, like the direct pay procedure, does not apply to the incorporation exception." 47 Ohio St. 3d at 70. Therefore, the Court reasoned, all of the materials used in manufacturing product, most of which is for sale, are excepted. The Court did not rule at all on the taxability of items withdrawn from stock and put to a use.

Moreover, "testing" was declared to be an adjunct use in R.C. 5739.01(R) [S.B. 92, effective 10-20-87], *provided that* the thing being manufactured was not removed from the manufacturing plant or facility for the test or check. Thus, after 10-20-87 the withdrawal of Program vehicles from inventory would not be exempt even if the Program use were considered "testing" for periods before that date, R.C. 5739.011(A)(4) [Am. H.B. 531, effective 7-1-90] defines testing as a process or procedure to identify the properties or assure the quality of a material or product. The Taxpayer's Program captures information which may be useful in making modifications in future production runs, but it is not a product quality control system encompassed by the definition. The objection is denied.

The petitioner next objects to the assessment of sales tax on the purchases of natural gas from Mobil Natural Gas, Inc. It claims that it purchased the gas from a natural gas company as defined in R.C. 5727.01. It is true that gas purchased from a qualified

natural gas company will be exempt from sales tax; however, other than a purchase contract provided by the petitioner, neither the petitioner nor the vendor provided any other relevant evidence to establish that Mobil Natural Gas, Inc. is a qualified natural gas company that is entitled to sell exempt gas. Since the petitioner has not satisfied the burden of proof, the objection is denied.

The petitioner also argues that the assessment of sales tax is erroneous on charges related to separately stated transportation cost on purchase of natural gas. Based on information provided by the petitioner at the hearing, the objection is allowed. This adjustment reduces use tax in the amount of $40,320.82.

Lastly, the petitioner objects to the assessment of sales tax on rental charges of vaporizers used to transform liquid nitrogen and oxygen into gas to create high temperature fuel for use in production machinery. It claims the vaporizers qualify as adjuncts under R.C. 5739.01(R)(2) and are excepted from use tax. The objection is well taken. The deletion of this use tax adjusts the percentage of error on expenses. This adjustment reduces use tax in the amount of $8,678.77.

The petitioner conceded to the objection relating to the purchases of core manufacturing equipment.

The adjustment made in the preceding paragraphs reduce the assessment by a total of $48,999.59 in use tax.

The request for penalty remission is granted conditionally as noted below.

Therefore, it is the order of the Tax Commissioner that if payment of:

	Assessment	*Penalty*	*Total*
(Sales Tax)	$171,742.16	$8,587.11	$180,329.27
(Use Tax)	297,537.88	14,876.89	312,414.77
(Preassessment Int.)	24,788.30	1,239.42	26,027.72
		Total.....	$518,771.76

is made within thirty (30) days after receipt by the taxpayer of this journal entry showing final determination, the assessment shall stand as adjusted in the above amount. In the event this matter is appealed to the Board of Tax Appeals, to an appropriate Court of Appeals, or to the Supreme Court, said thirty (30) day period shall begin to run from the date the entry of the Board of Tax Appeals is filed or the decision of an appropriate Appeals Court or the Supreme Court is rendered.

If the total amount is not paid as above provided, the assessment shall stand as adjusted in the following amount:

	Assessment	*Penalty*	*Total*
(Sales Tax)	$171,742.16	$25,761.32	$197,503.48
(Use Tax)	297,537.88	44,630.68	342,168.56
(Preassessment Int.)	24,788.30	3,718.25	28,506.55
		Total.....	$568,178.59

Payment of $299,549.72 was received subsequent to the issuance of the assessment and will be a credit against the above finding.

The unpaid amount of tax shall bear interest as prescribed by law from January 14, 1991 to the date of payment. This interest is in addition to either of the above total amounts and is due even payment is made within the thirty (30) day period mentioned above.

THIS REFLECTS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THE SUBJECT ASSESSMENT. UPON EXPIRATION OF THE THIRTY-DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02. THIS MATTER WILL BE CONCLUDED AND THE FILES APPROPRIATELY CLOSED.

/S/ROGER W. TRACY

Roger W. Tracy
Tax Commissioner

I HEREBY CERTIFY THE FOREGOING TO BE A TRUE AND CORRECT COPY OF THE ACTION OF THE TAX COMMISSIONER TAKEN THIS DAY WITH RESPECT TO THE ABOVE MATTER.

/s/Roger W. Tracy
ROGER W. TRACY
TAX COMMISSIONER

THE SUPREME COURT OF OHIO

1995 TERM

To wit: October 4, 1995

General Motors Corporation, Packard Electric Division, Appellant,	:	Case No. 94-642
v.	:	RECONSIDERATION ENTRY
Roger W. Tracy, Tax Commissioner of Ohio, Appellee.	:	(Board of Tax Appeals)

This cause came on for further consideration upon appellant's motion for reconsideration and the motion of Enron Access Corp. for leave to file brief amicus curiae in opposition to reconsideration. Upon consideration thereof,

IT IS ORDERED by the Court that the motions be, and hereby are, denied.

(Court of Appeals No. 92K146)

/s/Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

THE SUPREME COURT OF OHIO

1995 TERM

To wit: October 4, 1995

General Motors Corporation, Appellant,	:	Case No. 94-643
v.	:	RECONSIDERATION ENTRY
Roger W. Tracy, Tax Commissioner of Ohio, Appellee.	:	(Board of Tax Appeals)

This cause came on for further consideration upon appellant's motion for reconsideration and the motion of Enron Access Corp. for leave to file brief amicus curiae in opposition to reconsideration. Upon consideration thereof,

IT IS ORDERED by the Court that the motions be, and hereby are, denied.

(Court of Appeals No. 92K510)

/s/Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

THE SUPREME COURT OF OHIO

1995 TERM

To wit: October 4, 1995

General Motors Corporation, Appellant,	:	Case No. 94-644
v.	:	RECONSIDERATION ENTRY
Roger W. Tracy, Tax Commissioner of Ohio, Appellee.	:	(Board of Tax Appeals)

This cause came on for further consideration upon appellant's motion for reconsideration and the motion of Enron Access Corp. for leave to file brief amicus curiae in opposition to reconsideration. Upon consideration thereof,

IT IS ORDERED by the Court that the motions be, and hereby are, denied.

(Court of Appeals No. 92K4558)

/s/Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

RULE 29.6 DISCLOSURE

Pursuant to Supreme Court Rule 29.6, the following is a list of the non-wholly owned susidiaries of Petitioner General Motors Corporation.

2000 Aircraft Credit AB
ABA Motriz Financiamiento S.A. de C.V.
ABS Application Systems (Pty) Ltd.
ABS Computer Sales (Pty) Ltd.
ABS Computer Services (Pty) Ltd.
ABS Computer (Pty) Ltd.
ABS Information Technology (Pty) Ltd.
ACCSCO S.A.
Aeronautical Systems Designers Limited
AeroVironment, Inc.
Agora s.r.l.
Alambrados y Circuitos Electricos, S.A. de C.V.
Alpha Trans Leasing Verwaltungsgesellschaft mbH
AMBRAKE Corporation
American Mobile Satellite Corporation
AMRAAM International Licensing Company
Applied Intelligent Systems, Inc.
Aralmex, S.A. de C.V.
ARINC Incorporated
Aristaoom International, Inc.
ASEC Manufacuturing
ASEC Sales
Asset Leasing GmbH
Aura S.r.l.
Autocable Industries (Pty) Limited
Automotive Battery Manufacturing, Inc.
Automotive Polymer-Based Composites
Autos y Maquinas del Ecuador S.A. (AYMESA)
Banque Opel
Basintel S.p.A.
Beijing International Information Processing Company Limited
Beijing WY-GM Automotive Electronic Control Co., Limited

BSS Belgique
BSS Greece
Bujias Mexicanas, S.A. de C.V.
Calsonic Harrison Co., Ltd.
CAMI Automotive, Inc.
Canmax Inc.
Carus Grundstucks - Vermietungsgesellschaft mbH & Co.
Carus Grundstucks - Vermietungsgesellschaft mbH & Co.
CEI Co., Ltd.
China Management Systems Corporation
Cilva Holdings Plc
Cimflex Teknowledge
CLIOR
Coalition Undertaking Remedial Efforts, Inc.
COGSYS Limited
Compagnie des Faisceaux Tunisiens International S.A.
Compania Nacional de Direcciones Automotrices, S.A.
Componentes Delfa, C.A.
Comtrac Corporation
Controladora General Motors, S.A. de C.V.
Controladora Mexicana de Autopartes, S.A. de C.V.
Convergent Corporation
Daewoo Automotive Components, Ltd.
Database Software S.p.A.
Delkor Corporation (aka Chusikhoesa Delkor)
Delphi Ensamble de Cubiertas Automotrices, S.A. de C.V.
Delphi Packard Electric Venezuela C.A.
Delphi Vestiduras Fronterizas, S.A. de C.V.
Detroit Diesel Corporation
DHB - Componentes Automotivos S.A.
Diavia S.r.l.
DIRECTV Japan Kabushiki Kaisha
Doug Fox Parking, Inc.
DR DE CHIHUAHUA, S.A. de C.V.
DRB s.a./n.v. (a.k.a. Delco Remy Belgique)
Earth Observation Satellite Company
EDESA Societe Anonyme Holding
EDS-Padcom Clinical Research Beteiligungs GmbH

EDS Africa Limited
EDS Industries S.A.
EDS South Africa (Pty) Ltd.
EDS Vanco (Pty) Ltd.
Electrical Wiring Component Applications Partnership
Electronic Data Systems (EDS) Israel, Ltd.
Empresa Mixta GEMACVEN, S.A.
Empresa Nacional de Optica S.A.
Empresas "Ca-Le" de Tiaxcala, S.A. de C.V.
EPEC S.A. (a.k.a Ericson Packard Electric Componentes S.A.)
Europe Assurance Informatique S.A.
E.A.I. - Europe Assurance Informatique
Fabrica Nacional De Autobuses, C.A.
First Portland Technology Corp.
FLIR Systems, Inc.
Fox Travel Institute, Inc. (The)
France Informatique Juridique S.A.
Freevale Limited
Galaxy Latin America
Genasys L.C.
General Motors Colmotores, S.A.
General Motors de Argentina S.A.
General Motors Egypt, S.A.E.
General Motors India Limited
General Motors Kenya Limited
Genie Mecanique Zairois, S.A.R.L.
GEST'HELP Huissier
GFI-TB La Mondiale Bull S.A.
GM-Saab Communication GmbH
GM Credit AB
GM Finance HB
GM Nigeria Limited
GM Ovonic L.L.C.
GMAC de Argentina S.A.
GMB Belgique
Gulado y Control S.A.
G. & F. Company

G.M.A.C. Financiera de Colombia S.A. Compania de Financiamiento Comercial
H & D Radio Frequency Identification Products
H & R Company
HBH Company
Hitachi Data Systems Holding Corporation
HKV
HMK
Hughes-JVC Technology Corporation
Hughes-Kenwood RDSS, Inc.
Hughes-Pareto Research Partnership
Hughes Arabia Limited
Hughes Escorts Communications Limited
Hughes Ispat Limited
Hughes Olivetti Telecom, N.V.
Hughes Software Systems Private Limited
i-Logix Inc.
IBC Vehicles Limited
IBC Vehicles (Distribution) Limited
Industries Mecaniques Maghrebines, S.A.
Industrija Delova Automobila, Kikinda
Information Systems Solutions (Pty) Ltd.
Infosys
Insurance Software Solutions Corporation
Integrated Multimedia Solutions, Inc.
Interbank On-Line System Ltd.
International Electro-Optical Industry Anonim Sirketi
IRISS Company
Istiservice
Istituto R.S.O.
Isuzu-General Motors Australia Limited
Isuzu Motors Limited
ITC Inland Teknik Oto Yan Sanayi Limited Sirketi
ITT Automotive Electrical Systems, Inc.
I.K. Coach Co., Ltd.
Japan Network System
Japan Satellite Communications Network Corporation
Japan Systems Company Limited

Jinbei GM Automotive Co. Ltd.
Justinian Investments Sixteen (Pty) Ltd.
Kabeltrommel GmbH & Co. KG
Katoon, S.A. de C.V.
KDS Company, Ltd.
K.C.E. Company, Limited
KK. J.C.I.S.
K.K. Nihon Game Cards
LG-EDS Systems, Inc.
Low Emission Paint Research and Development Partnership
Lufthansa Systems GmbH
Macopel S.A. de C.V.
Management Technologies, Inc.
MCE
Metal Casting Technology, Inc.
Microelectronics and Computer Technology Corporation
MLT Holding Limited Partnership
M&DY Corporation (Pty) Ltd.
National Marketing Company
Neodata Corporation
New Cure, Inc.
New Dimension Software Ltd.
New United Motor Manufacturing, Inc.
New Venture Gear, Inc.
Nippon Avionics Co., Ltd.
Nippon EDS Company, Ltd. (a.k.a. Nippon EDS Kabushiki Kaisha)
North American New Cars, Inc.
Oel Systems (Pty) Ltd.
OGIP ORGANISATION SARL
Omnibus BB Transportes, S.A.
One Touch Systems, Inc.
Opel-Automobilwerk Eisenach-PKW GmbH (a.k.a. Opel-AWE GmbH)
Opel-Handler Versicherungsdienst GmbH
Opel-Wohnbau GmbH
OPEL Bankgesellschaft m.b.H.
Opel France S.A.

OPEL Leasinggesellschaft m.b.H.
Packard CTA Pty. Ltd.
Packard Electric Baicheng
Packard Electric Hebi
Packard Electric Vas kft
PDES, Inc.
Postal Buddy Corporation
Progical S.A.
Promotora de Partes Electricos Automotrices
Promotora S.A. de C.V.
PT General Motors Buana Indonesia
PT. Pasifik Satelit Nusantara
P.T. GMAC Lippo Finance
P.T. Mesin Isuzu Indonesia
RALS (a.k.a. RAM Alternate Launcher System)
Rio Bravo Electricos, S.A. de C.V.
Riser Foods, Inc.
Robotic Vision Systems, Inc.
Ruedas de Aluminio, C.A.
S O N I A S. A. A Directoire
Saab Automobile AB
SAFRI
Satelitron S.A. de C.V.
Serampang Hughes Sdn.Bhd.
Shanghai Hughes Network Systems
Shinsung Packard Company, Ltd.
Simpad, Sociedad Anonima de Capital Variable
Sipe Optimation S.p.A.
Sistemas de Asientos Para Vehiculos Automotrices, S.A. de C.V.
Sistemi & Technologie S.p.A.
SJ & LA Associates
Sociedad de Comercializacion Internacional Colmotores S.A.
Societe Auxiliare Pour Le Financement et Les Realisations Industrielles
Societe Flerienne De Participations
Societe Francaise des Amortisseurs de Carbon S.A.
Spectra Securities Software Inc.
Standard Missile Company, L.L.C.

Subarban Limited Liability Company
Sabaru-Isuzu Automotive, Inc.
Sung San Company, Ltd.
Supercomputer Automotive Applications Partnership
Suzuki Motor Corporation
SV-EDS Technology Services, Ltd.
Synon Italia s.r.l.
Systems & Management S.p.A.
SYSTER-Informatique
Telemac S.A.R.L.
Telemesures Acoustiques Telemac S.A.R.L.
Teramira Holdings, Inc.
The Gulf Industrial Technology Company (KSC)
Translant, Inc.
UKADGE Systems Limited
UMW-EDS Technologies Sdn. Bhd.
UMW Holdings Berhad
United Australian Automotive Industries Limited
United States Automotive Materials Partnership
UPE Systems Services Sdn. Bhd.
Uveral S.A.
U.M.I. Universal Motors Israel Ltd.
Video Lottery Technologies, Inc.
View Engineering, Inc.
Volvo GM Canada Heavy Truck Corporation
Volvo GM Heavy Truck Corporation
White House Consulting (Pty) Ltd.
White House Midrange Services (Pty) Ltd.
White House Technologies (Pty) Ltd.
Woodbridge Foam Deutschland, GMBH
Worldmaster Marketing Pty Ltd.
Zhejiang Delphi Asia-Pacific Brake Co. Ltd.